

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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77-7626
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARSHALL P. SAFIR,

Plaintiff-Appellant,

-against-

ROBERT J. BLACKWELL, Assistant Secretary
for Maritime Affairs, United States
Department of Commerce, et al.,

Defendants-Appellees.

and

UNITED STATES OF AMERICA, ex rel. MARSHALL P.
SAFIR and MARSHALL P. SAFIR,

Plaintiffs-Appellants,

and

AMERICAN EXPORT LINES, INC., et al.,

Defendants-Appellees.

----- -X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR

UNITED STATES OF AMERICA, ex rel. MARSHALL P. SAFIR
and MARSHALL P. SAFIR

MARSHALL P. SAFIR
PRO SE
41 Flatbush Avenue
Brooklyn, New York 11217

Docket No.
77-6219

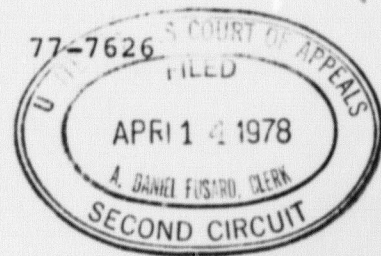


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Miscellaneous

3 Moore's Federal Practice 15.15

1A Barron & Holtzhoff-Federal Practice & Procedure
Sec. 448 Wright Ed.

Statutes

46 U.S.C. 1227

31 U.S.C. 231, 232, 235

ARGUMENT

I

The discretion of the District Court under rule 15(a) is not at issue in 77-6219. The correct interpretation of Rule 15(c) is the issue here. Appellant respectfully submits that Judge Dooling was in error in denying amendment to the complaint in Eastern District docket 68c643. In this case unlike Goss vs. Revlon Incorporated, 22frs2d440, 441, this pro se appellant is not seeking to add "a myriad of new claims" under Rule 15(a). As stated by this Circuit in Middle Atlantic Utilities vs. SMW Development Corp. 392f2d380, 384, 385, in its description of Foman vs. Davis 371 U.S. 178, it is within the trial Judge's discretion to grant leave to amend a complaint. However he may not abuse his discretion, and if he refuses to grant the leave without any justifying reason (Foman vs. Davis supra) or bases his denial to amend on erroneous beliefs, such a denial is reviewable. Amendments should be granted liberally -- the trial Judge should focus on the resultant prejudice to defendant. . . and here the trial Judge made no finding of prejudice."

Judge Dooling made no finding of prejudice to the defendant here and on the contrary, pointed out their knowledge of appellants' intention to participate with the United States by an alternate theory of recovery, see pages 9 to 13 of his appendix.

Judge Dooling's own memorandum sets forth the extent of

notice that the parties had to defend themselves against any prejudice, "by tardiness in the appellants clarifying his position" Cf. Snoqualmie Tribe ex rel Skykomish vs. U. S.

The carrier appellees in Docket 77-6219 do not challenge the decision in United States vs. Templeton, 199 F. supp. 179, Counsel for the government appellees misconstrue the "Templeton" decision by citing the diversity of the wrong suffered in first count of the "Templeton" complaint instead of the identity of the wrong suffered and the conduct causing such wrong in the second count. It is the second count which parallels the circumstances in the instant appeal not the first count. The adequacy of notice on the second count was evidenced in the fact of the twenty-two bales of cotton which was the subject of the original complaint were the same twenty-two bales which were the subject of the second count of the amended complaint. In the instant appeal appellant's demand is for the same relief as in the original complaint. The recovery of all subsidies, both construction and operating differential subsidies, paid to the named violators in the original complaint save for the doubling of damages.

"Templeton" is specific and a definitive authority on "relating back" as it pertains to the False Claims Act. Support for it also can be found in Williams vs. the United States, 405 f2 d 234, 236, 238, 5th Circuit (1968).

This was an action wherein the 5th Circuit reversed the denial of leave to amend under Rule 15(c) in an action under the

Federal Tort Claims Act. The Court held that as long as the amended complaint refers to the same transaction or occurrence and defendant was put on notice there will be no bar to amendment and even new defendants and new theories of recovery will be allowed.

As stated by Chief Judge Brown, "Number 1-A Barren and Holpzhoff, Federal Practice and Procedure, sect. 448 (Wright Ed. 1960) Rule 15(c), is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from the Statutes of Limitations than one who is informed of the precise legal description of the rights sought to be enforced." 3 Moore Federal Practice, paragraph 15.15 (2) at 1021.

In Docket 776219, as stated all the carriers were named in the original complaint albeit not until 1970 as defendants. Clearly, notice not only of the suit to recover all subsidies paid to them during the offending period was given to them but jeopardy more severe than the doubling of damages was incorporated in the original complaint -- the demand for cessation of payment of all subsidies in the future. Since 1969, these violators of section 810 have received in excess of four billion dollars far greater than the amount at issue at double damages here. When the carriers intervened as defendants they did so in time to defend themselves against all issues,

And as stated in Williams vs. United States supra, "Determining whether the adversary had fair notice, the usual emphasis of

"conduct transaction or occurrence" is on the operational facts which give rise to a claim by a particular party based on any one or all of the theories conjured up, whether timely or belatedly."

In this case as in Williams vs. United States, supra, the conduct or occurrence (the violation of section 810) was based on a constant and unchanging operational set of facts and was stated fully and subsequently proved.

Any attempt to equate the present claim for double damages under the False Claim Act on an identical set of operational facts which existed then as now, with the diversity situation in Rosenberg vs. Martin, 478 f 2d 520, is an absurd reading of comparative general fact situations.

In "Rosenberg", plaintiff gave no notice that a claim for the violation of his right to a fair trial would be amended with a new and different claim of physical assault years later.

The government makes the point in its memorandum here, after not opposing the filing of the action in 77-1093 (in contrast to vigorous opposition in an appearance in U.S. ex rel, Greenberg vs. Burmah Oil 558 F.2d 43 - Why did he wait five years more to actually file suit? The suit was not filed because under the procedure adopted by the Secretary of Commerce (and to which this appellant objected vigorously) there was no basis for the filing until all the criteria for the finding of the violation had been met and all administrative appeals had been decided against the defendants. The delay in filing the FCA amendment here, or the filing of the

FCA suit in 77C-1093 was directly attributable to the delay in the administrative exhaustion process from the Administrative Law Judge through the deliberations of the Secretary of Commerce. The former Secretary Dent, whose potential abuse of discretion is a subject of the United States Court of Appeals decision in the DC Circuit on February 11th, 1977 (Safir vs. Kreps 551 F2d 447) confirmed the violation of section 810 exactly six years and three months after this action was filed in 1968. Whether the abuse of discretion in regard to recovery of less than all subsidies paid was in any way planned to foreclose an FCA action by exceeding the six-year requirement is not known at this time -- perhaps it will be made clear after investigation and discovery in 77C1093 on remand. It is already clear that by adopting the anomalous procedure of holding hearings to decide whether to sue and then settling before suit was instituted that he avoided the fact that the carriers filed false vouchers for subsidies.

There can be no accusation of lack of diligence on the part of the appellant when the vindication of his claim that section 810 had been violated required the reversal of dismissal in the Eastern District by Judge Dooling in 1968. Safir I. The narrowing of the issues against de novo review in Safir II, and repeated attempts to prod the reluctant Department of Commerce to complete the mandate of this Circuit in Safir I and Safir II,

Indeed, there are review actions instituted by the carrier appellees which are still unresolved in the District of Columbia Circuit on the remand of Safir vs. Kreps 551f2447 as therecent order of Judge William Bryant will attest. The District of Columbia remains an active forum for attempts by these defendants to overturn this plaintiff's victory on the violation issue. In spite of Judge Wright's opinion in Safir vs. Kreps supra which reduces the carrier's action against the Secretary of Commerce in DC Dockets 74-1788 and 75-0077 to the vestigial, the case is yet closed against these litigants.*

In this regard, the exception to Foman vs. Davis 371 U.S. 178 (1962), cited in Troxel vs. Schwinn 489 f2d 968, would not apply here. Defendant appellees on page 12 of their brief state that appellant "has chosen instead to delay assertion of such a claim (False Claims Act) . . . whether by new complaint or amendment of his existing complaint in the District Court . . . until the issues under section 810 had been fully decided."

But these carriers have not abandoned their cases in the DC Circuit to reverse the findings of violation against them. The issues of Section 810 in their conception have not been fully litigated or decided.

This Court has over the years evidenced concern over congressional intent regarding the position of the victim in a violation such as this. On the basis of the decision of the

* see next page - 6-A

- * Judge Bryant's recent order which has been brought to the attention of this Court by the carrier appellees has been appealed to the DC Circuit Court of Appeals by this appellant on the grounds that this is one of those cases where a reviewing court may look beyond the grounds of decision because there were no logical contemporaneous findings by the Secretary to support it. Citizens to Preserve Overton Park^{v.} Volpe 401US402, 415 (1971).

Secretary and the narrow review objectives under the Administrative Procedure Act adopted by the District Court of the District of Columbia, only this Court is in a position to determine how its own mandate in Safir I can be implemented other than by the amendment sought here under Rule 15(c).. This appellant stated in Safir vs. Blackwell, 469 f2d 1061, app. pages 91 - 98 in 1972 that the ultimate statutory authority for such implementation was 31USC231, 232, 235 and indeed FCA lurked behind every line of these quotations from Safir I:

(1) "The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past . . . "

(2) "Recovery of such payment imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him."

(3) "We find that section 810 is defined to promote the competitive interest of a victim . . . plaintiff Safir, stated in an affidavit that he desired to return to the shipping business as soon as possible. We hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the protection of section 810 with regard to raising the issue of the administrator's refusal to seek recovery of past payment."

(4) "The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability and further relief consistent with the statutory scheme."

(5) "The Secretary may not refuse to proceed against the AGAFBO line s without at least considering the interest of the victim, about which Congress was so concerned."

The interest of the victim has been addressed neither by the Secretary nor it would appear by the District Court in the District of Columbia in the narrow scope of its recent interpretation of the remand. It must have been that this Court intended sub silentio, that upon completion of the administrative determination that all eight ship lines had sufficient culpability to be in violation of section 810 that Rule 15(c) would accommodate the amendment. How else can justice be done to accomplish the promise held out to appellant by the decision in Safir I?

II

Judge Dooling held that the amended complaint would add a new claim as to the identity of the persons against whom the relief was sought and he could find no basis for authorizing an amendment that would "Transform the case, in effect dismiss the original defendants."

In Travelers Insurance Co., vs. Brown, 338 ^{F.2d} page 235, the 5th Circuit in examining the narrow interpretation of the State of Louisiana Court of Appeal in regard to relating back of amendments as opposed to the Federal Courts liberality under Rule 15 -- explained how even new plaintiffs and new defendants would be allowed as well as new theories of recovery. In examining the State Court Appeal discussion in Andrefront vs. Ochser, App. 1955 84 So2d63, it noted that the Court of Appeal was careful to say:

"Thus it appears that all of the cases seem to be based on the theory that the knowledge of the demand or its origin

and basis, are imparted to the defendant even though the original suit was brought against the wrong defendant or against the defendant in an improper capacity or even when brought by an improper plaintiff, so long as the proper person has been apprised of the demand in any legal capacity prescription is interrupted."

The Court then held that even if this change is seen as more than a clarification of the original complaint, it can be interpreted only as a change in the theory of recovery. The conduct or occurrence that gave rise to the demand for payment (in this instant case repayment) remains unchanged and the Court further held that, "While the original complaint may not have been sufficient to support a recovery, it was adequate to interrupt prescription with regard to any party apprised of the suit in a legal manner."

The carrier defendants here were first notified of the suit in 1968 by this appellant, exhorted to make an appearance by the 2nd Circuit decisions in Safir I and Safir II, and finally voluntarily intervened as defendants to preclude any prejudice to the protection of their future subsidy payments and their defense against refund of those already illegally paid to them.

I I I

The lower Court's decision that it lacked jurisdiction of the action in EDNY 77C 1093 was based on interpretation of the words, "when it shall be made to appear that such suit was based upon evidence in possession in the United States at the time such suit was brought." See US ex rel Vance vs. Westinghouse, 363 F. Supp.

1038 at pp. 1042, 1043, 1044, 1045.

In the notice of pendency filed with the Attorney General filed on May 27, 1978, this appellant stated, "If additional information is needed the undersigned is prepared to cooperate fully." It was this statement that negates even the oversimplistic interpretation of US and Aloff vs. Aster, 3rd Cir., 1960, 275 f2d281, in regard to the phrase, "when it shall be made to appear."

When the notice was sent to the Attorney General this appellant considered that he had offered, in his own opinion, sufficient information to the government for the prosecution of this case. This personal opinion in no way precluded the use of the fund of additional information that appellant had to offer such as the information he later gave in the Safir deposition. Relevant parts of the testimony (in Judge Dooling's words) were annexed to the memorandum and order here. (Appendix pages 22-34) While this deposition raised factual issues which were much too serious to be ignored (and before any pretrial conference was called to discuss discovery and other matters) the lower Court entertained and granted defense motions for summary judgment to dismiss the case. Why are the appellees and the Department of Justice so keen to sweep the allegations under the rug? Why do the defendants conjure words like "incredible", "fanciful", and "unbelievable" and "undocumented", to describe them rather than join the issue by simply denying them?

As set forth in the transcript of the hearing before Judge Dooling on October 28, 1978, discovery of the matters listed on Appendix pages 288, 289, 290, would surely have elicited evidence to either further substantiate the corrupt conspiracy or clear the accused parties of any complicity. Certainly, after such discovery a determination could more effectively be made of the phrase, "When it shall be made to appear. . . "

Appellant submits this dismissal was not proper under Rule 56, see Poller vs. Columbia Broadcasting, 368 US 464 (1961) at page 473 and should be reversed on these grounds alone.

The creation of a jurisdictional bar to the Court's cognizance of the case when it was in such posture and the silence and surface indifference of the Department of Justice to any investigative responsibility here imparts a Kafkaesque atmosphere to this proceeding which is unhealthy. After ten years of procedures contoured by this Circuit in *Safir I* to come to a near dead end with abuse of administrative discretion implied by Judge Wright in *Safir vs. Kreps supra*, and a new round of judicial and administrative review with a new generation of reviewers makes a mockery of the concern for the victim extolled in *Safir I*. It should compel this Court to grant the amendment or reexamine the efficacy of decisions like *Safir I* which hold out reasonable expectations to the party aggrieved -- which expectations, it is hoped will not "arise parthenogenetically from broad phrases." to be later endangered by footnote.

IV

While the appeal in 77--7626 did not address the statute of limitations issue because Judge Dooling's decision did not reach it other than as it would apply to the relating back under Rule 15(c), the appellees, citing Jaffke vs. Dunham, 352 US 280, 281 (1957), would have this Court consider this issue. The government appellees citation of U.S. vs. Borin, 209 (2d 145 (1974) in 77-6219, overlooks the fact that False Claim Vouchers relating back to the earlier payments in 1966, 1967 were still being paid in 1972 and as late as 1974 as their own actions dissolving the injunction against the carrier appellees will attest. See appendix page 122, regarding Dockets number 72, 74 and 75. Even if the theory of U.S.v.Borin, is to be adopted in this Circuit, which is unlikely, these carriers were filing false claims long after the decision of the Federal Maritime Commission in Docket 65-13 in 1967 and indeed long after the carriers were put on notice in 1972 in Safir vs. Blackwell supra, Appendix 91-98, that the FCA would be invoked by amendment.

When the U.S. Attorney cites U.S. vs. Borin, 209 F.2d 145 (1954) and raises the cry, "Why did he wait five years more to actually file suit?", he compounds not only his apathy, but at this late date after a waiver in favor of this plaintiff in 77Cl093, he would prejudice the case of the United States by lending his voice to the defendants' position. In 1972, the defendants, the government and, unhappily the Second Circuit, blurred the Qui Tam right and remedy. At this juncture, plaintiff

respectfully submits "The policy of repose expressed in statutes of limitation is frequently outweighed where the interest of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights, but rather has been prevented from asserting them." Burnett vs. NY Central Railroad Company, 380 US424.

Contrary to defendants' contentions, the governing legal interpretation of the False Claims Act is the case of US ex rel. Marcus vs. Hess 377 US 537 as opposed to US ex rel. Brenshilber vs. Bauch and Lomb, 131 F.2d 545 (2nd Cir. 1942).

The Courts, as stated earlier, have held the statute to be a civil sanction and, therefore, remedial (see U.S. vs. Templeton 199 F.Supp at 182). Since the defendants urge laches, the case of Holmberg vs. Armbrecht, 327 U.S. 392 is directly on point under the circumstances of the instant actions: "Apart from penal enactments, Congress has usually left the limitations of time for commencing actions under national legislation to judicial implications." (Holmberg at 395).

"The present case concerns not only a federally-created right, but a federal right for which the sole remedy is in equity." (IBID)

"When Congress leaves to the Federal Courts the formulation of remedial details, it can hardly expect them to break with historical principles of equity in the enforcement of federally created equitable rights," (IBID)

"If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." (IBID p. 396)

"And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." (IBID p. 397)

The doctrine of U.S. vs. Borin supra as rejecting "Holmberg" does not survive the doctrine of U.S. vs. Neifert - White 390U.S.228 as Judge Dooling himself appears to accept.

V

The period of false claims activity culminating in the actual payment of federal funds begins with the filing of a certified voucher knowing it to be false, and ending with the negotiation of the Treasury check knowing it to be a payment to which the claimant is not entitled.

"It seems quite clear that the objective of Congress was broadly to protect the funds and property from fraudulent claims regardless of the particular form or function of the government instrumentality upon which such claims were made,

United States ex rel Marcus vs. Hess, Rainwater vs. United States 356 US 592,

The false claims activity here began with the filing vouchers in 1965 and 1966 for up to 90% to 95% of the illegal subsidies and continued in 1971 for the remaining 5% to 10% of illegal vouchers. The transactions were culminated when the checks sent by the United States Treasury Department Disbursing Office in Philadelphia, Pennsylvania for the account of the Department of Commerce was caused to be presented for payment by commercial banks to the United States Treasury. At no time during this multi-year process did the claimants admit their violation of their subsidy contract, or take any action to return the funds voluntarily. The statute of limitations in FCA was not designed to be foreshortened for the protection of wrongdoers by interpretation of the earliest evidence of the Commission of the act of wrong doing, but by the most recent acts applicable to the same illegal transaction. There is no difference between the conduct in Scolnick vs. U.S. 331 F2d. 598 wherein the defendant cashed checks which he knew had been issued to his company by mistake and these defendants here who cashed subsidy checks to which they knew they were not entitled. For the purposes of the statute of limitations, both fraudulent acts against the United States Treasury are indistinguishable. Similarly, the date was established here at which the statute starts to run. Judge John Bartels in U.S. vs. Silver 384 F. Supp. 672 (EDNY 1974) decided (affirmed 515 F2d. 505 Second Circuit 1975) and the Honorable David Trager, the U.S. Attorney appearing in this action was the successful advocate in that earlier action. In that case

... the false claim arose at the point beyond the date the voucher was submitted and beyond the date that the government check was sent out by the disbursing officer.

It is of little consequence in the civil action under recent interpretation of False Claim Act violations whether the claim has its roots in forgery as in U.S. vs. Silver, supra, or being false, fictitious or fraudulent as in U.S. vs. Eagle Beef Cloth Company 1964 DCNY 235 F. Supp. 491, or merely by getting benefits to which a claimant is not entitled as in U.S. vs. Toepelman 141 F. Supp. 677 affirmed in part and reversed in part on other grounds 356 U.S. 595 78 Supreme Court 950. The date of the presentation of the government check to the Treasury is the date of the final claim. The statute tolls from that date. This position was reaffirmed in U.S. ex rel Vance vs. Westinghouse, and the Court's interpretation in that case followed the case of U.S. vs. Klein 356 F. 2d 983 holding that the six-year period does not start to run until the final date of each claim. The reasoning is that there are no false claims until the government makes payment. Finally, in cases where the false voucher can be simply identified, the Supreme Court in U.S. vs. Bornstein 423 U.S. 303 stress^{ed} the importance of the date of payment in determining where false claims arise regardless of whether the statute of limitations is at issue.

It is obvious from the "Bornstein" case that appellees holding

that where the defendant submits the claim directly to the government, the statute of limitations begins to run on the date of the submission of the claim. ^{is incorrect.} All recent case law points to the date of payment by the United States.

VI

The U.S. Attorney indicates disfavor at the thought of being a stakeholder, or a bill collector for others in his citations in reference to attachments and garnishee. The suggestion that the United States will be the stakeholder for Marshall Safir is absurd since the action calls for the recovery for the benefit of the United States Treasury, with only a statutory amount set aside for the "Private Attorney General".

Further, he erroneously assumes that the Courts have said the last word on the limits to the discretion of the Secretary in this case. Plaintiff respectfully reminds him of the remand of DC Docket 74-1474.

As stated by Judge Wright in Safir vs. Kreps Supra:

"The issue reserved by the 2nd Circuit in Safir I -- the precise limits on the Administrator's (Secretary's) discretion not to seek recovery of all subsidies paid -- must now be decided."

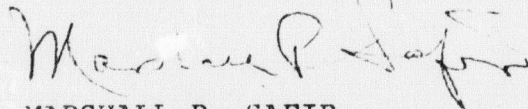
The most remarkable statement reiterated in government appellees brief in 77-6219 is:

"Both Courts have declared that the Secretary has discretion to mitigate subsidy recovery. It follows that a claim for more than that amount is not false."

In short, one million one hundred thousand dollars are false claims, but the remaining two hundred twenty-five million dollars are not, by Secretarial Decree. While the appellant is grateful for the government's support as to the falseness of any of these claims, he rejects this package deal. Judge Wright has already stated, "The Secretary's failure ... gives little assurance that we have been presented with an order resulting from a reasoned decision making process." While it is true that the Secretary has no False Claims Act function, once this Court determines that the prayer for alternate relief here is sound, the Secretary's duties under prayers D, E and F of the United States ex rel Safir will be ministerial.

WHEREFORE: Appellant prays that this court reverse the Court below and grant leave to amend the original complaint 68C643 and to vacate the order of the Court below in Docket 77C-1093 and remand for further proceeding.

Respectfully submitted,



MARSHALL P. SAFIR,
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April 13th 1978

CERTIFICATE OF SERVICE

I Arleen O'Donnell hereby certify that I have this 14th day of April, 1978, mailed by first class pre-paid postage copies of the Reply Brief of the United States and Marshall P. Safir to all counsel of record in this proceeding.

Arleen O'Donnell
Arleen O'Donnell

Dated: This 14th day of
April, 1978

Regina E. Levine

REGINA E. LEVINE
Notary Public, State of New York
No. 244735573
Qualified in Nassau County
Commission Expires March 30, 1979